UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHR SOLUTIONS, INC.	§	
	§	
Plaintiff,	§	
	§	
V.	§	CIVIL ACTION NO. 4:23-cv-1901
	§	
GILA RIVER TELECOMMUNICATIONS, INC.	§	
	§	
Defendant.	§	

PLAINTIFF CHR SOLUTIONS, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT GILA RIVER TELECOMMUNICATIONS, INC.'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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Plaintiff CHR Solutions, Inc. ("***CHR***"), hereby files this Memorandum of Law in Opposition to Defendant Gila River Telecommunications, Inc.'s ("***GRTI***") Motion to Dismiss (the "***Motion***") [Dkt. No. 18], and in support would respectfully show the Court the following:

INTRODUCTION

This lawsuit arises from a software project CHR performed for GRTI under a series of contractual agreements, which GRTI now unjustifiably seeks to hide behind claims of tribal sovereign immunity to avoid its payment obligations. GRTI is a for-profit commercial entity allegedly organized under the laws of the Gila River Indian Community (the "***Community***"). GRTI is a wholly separate entity that is not entitled to the protection of tribal sovereign immunity. GRTI expressly consented to the jurisdiction of the federal and state courts located in Harris County, Texas, expressly waiving any tribal immunity it alleges to possess. Since GRTI has unequivocally waived any alleged tribal immunity, and has consented to the jurisdiction of this Court, GRTI's Motion to Dismiss should be denied.

STATEMENT OF FACTS

GRTI sought out CHR, a Texas entity, to provide software and service designed to help GRTI and its affiliated entities to manage the day-to-day changes that take place in the telecommunications industry. On March 8, 2021, CHR and GRTI entered into several inter-related agreements, including a Master Services Agreement (the "***Master Agreement***") (collectively, the "***Contracts***") whereby CHR agreed to license its software platform to GRTI and perform related development, implementation, and maintenance work. *See* Declaration of Arun Pasrija at ¶4; Exhibits A.

The Contracts were signed by James Meyers, the CEO and GM ("GM") at the time. *Id*. The current CEO and GM, Jennifer Burkhalter. *Id*., at ¶¶10-11, Exs. B, C. Ms. Burkhalter signed change order no. CO-3252-04 for implementation changes ("CO-04"). CO-04 added Alluvion as

a Billing Company. *See* Pasrija Decl. at ¶10, Ex. B. In return, GRTI and Gila Local Exchange Carrier d/b/a Alluvion were responsible for paying activation fees, data cut fees, and monthly software as a service fee. *Id*.

Section 10.d of the Master Agreement, provides:

> "This MSA shall be interpreted in accordance with the laws of the State of Texas, exclusive of its conflict of laws provisions. The laws of the State of Texas shall apply to any mediation, arbitration, or litigation arising under this MSA and any mediation or arbitration shall be controlled by the rules of the American Arbitration Association. The ***exclusive jurisdiction*** for all disputes arising between the Parties in connection with this MSA shall be the state and federal courts located in Harris County, Texas, and each Party hereby ***submits itself to the exclusive jurisdiction*** of such courts subject to the foregoing restrictions." *Id*. (emphasis added).

CHR performed work for GRTI and its subsidiaries, including Gila River Asset Management ("***GRAM***"), Native Technology Solutions ("***Native Tech***") Gila Local Exchange Carrier ("***Gila LEC***"), through its assumed names 1) Alluvion Communications ("***Alluvion***"), 2) Gila River Broadcasting, and 3) Digital Connect Initiative ("***DCI***"). Gila LEC is a for profit corporation registered to do business in Arizona. Rodriguez Decl. at ¶6. Native Tech is an Oklahoma limited liability company. Gila LEC registered its trade names Alluvion, DCI, and Gila Broadcasting with the state of Arizona.

GRTI and its subsidiaries own real property and have provided security interest in their personal and real property. Rodriguez Decl. at ¶¶10-12. For example, GRTI entered into a Security Agreement, Leasehold Mortgage, Fixture Filing and Enabling Resolution, granting a security interest in a transmitting utility and place limitations of paying stock dividends while loan is outstanding. *Id*. at ¶11, Ex. F. Upon information and belief, GRTI has either had an associated company Gila River Telecommunications Subsidiary, Inc., or has been renamed. Rodriguez Decl. at ¶15, Ex. I.; *see also* Villareal Decl., Ex. B. According to an SEC filing, GRTI may have been owned by Associated Telecommunications and Technologies, Inc. ("***ATTI***"), an Oklahoma

Corporation. Rodriguez Decl. at ¶17. GRTI and Dobson Cellular of Arizona, an Oklahoma Company owned by Dobson Communications Corporation, acquired GRTI or merged GRTI and Dobson Arizona through multiple transactions, including one in which all shares held be the Community were redeemed, leaving ATTI, now owned by Dobson, as the sole shareholder. *Id*. GRTI may also own a 25% interest in Gila River Cellular Partnership ("***Gila Cellular***") with Cellco d/b/a Verizon Wireless owning the remaining 75%.[1] *Id*; at Exs. L-M. GRTI and Dobson Arizona, entered into an asset purchase agreement to purchase Gila Cellular. *Id*., at Ex. I. Dobson financed part of the purchase price paid by GRTI for its 25% interest, secured by GRTI's interest.

The software design, development, and implementation to be performed by CHR for GRTI and its subsidiaries was significant and involved the implementation and establishment of GRTI's customer relationship management software, billing and back-office functions, web self-care platform, and facilities management system. *See* Pasrija Decl. at ¶13. CHR performed the work in Texas and GRTI directed payments owed under the Agreements to CHR in Texas. *Id*. at ¶14. Upon information and belief, GRTI provides service to individuals and entities both on and off the reservation. GRTI employees consist of both member and non-member employees.

ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION

A party opposing a dispute resolution provision has the burden of proof to establish the provision does not apply. *See Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 611-12 & n.6 (Tex. App.--Houston [1st Dist.] 2005, no pet.). GRTI contractually agreed to a dispute resolution provision expressly consenting to the jurisdiction of this Court. *See* Pasrija Decl. Ex. A at §10.d. As a result, GRTI has the burden to establish the dispute resolution does not control.

[1] Verizon acquired the 75% interest from Dobson Arizona.

A party asserting sovereign immunity from suit bears the burden of demonstrating its entitlement to that immunity. *Hutto v. South Carolina Retirement System*, 773 F.3d 536, 543 (4th Cir. 2014). Sovereign immunity is distinct from a pure subject matter jurisdiction analysis since sovereign immunity, unlike subject matter jurisdiction, can be waived. *Id*. at 542-543. The same principle should apply to an entity asserting tribal immunity, placing the burden on the party asserting immunity to show by a preponderance of the evidence that it is an "arm of the tribe." *People ex. Rel. Owen v. Miami Nation Enterprises*, 386 P.3d 357, 370 (2016). Since "corporations affiliated with an Indian tribe [do not automatically] have sovereign immunity" GRTI bears the burden of establishing it is entitled to an extension of tribal immunity. *Sue/Perior Concrete & Paving, Inc. v. Lewiston Gold Course Corp*., 25 N.E. 3d 928, 934 (2014).

GRTI's Motion should be denied under Rule 12(b)(1) as the facts clearly establish GRTI's waiver of any alleged immunity and that GRTI is not entitled to an extension of immunity in the first place.[2] A Rule 12(b)(1) motion warrants dismissal "only if it appears certain that the plaintiff cannot prove any set of facts in support of [its] claim that would entitle plaintiff to relief." *Choice Inc. of Texas v. Greenstein*, 691 F.3d 710, 714 (5th Cir. 2012).

A. CHR Has Established Jurisdiction on the Face of its Complaint

GRTI attempts to establish both a "facial" and "factual" attack. When, as here, a defendant contests the facial sufficiency of the facts pled in the complaint to confer jurisdiction, those facts are entitled to a presumption of truth. *See Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 553 (5th Cir. 2010) (accepting material allegations in the complaint as true

[2] In the alternative, CHR requests jurisdictional discovery and an evidentiary hearing to determine jurisdiction before this motion is granted, because there are controverted facts and credibility issues raised by GRTI's Motion, declarations, and supporting documents, and GRTI maintains exclusive possession over key facts. *See, e.g. Finn v. Great Plains Lending, LLC*, 689 Fed. App'x, 608, 610 (10th Cir. 2017)("[w]hen there is a factual question regarding a sovereign's entitled to immunity, and thus a factual question regarding a district court's jurisdiction, the court should give the plaintiff ample opportunity to secure and present evidence relevant to the existence of the jurisdiction").

when subject matter jurisdiction was challenged on the basis of the pleadings);*see also Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981). Since GRTI has alleged a facial attack, this Court must accept the allegations in CHR's complaint.

CHR has properly pled subject matter jurisdiction based on diversity under 28 U.S.C. §1332. GRTI argues a tribally chartered entity is a stateless citizen for the purposes of diversity jurisdiction. *See* Mot. at 8. However, the other circuit cases relied on by GRTI speak only to the citizenship of a *tribe* and does not speak to how courts have addressed citizenship of a tribal for-profit commercial entity in the diversity context. Courts, including Fifth Circuit courts have applied traditional corporate citizenship analysis under 28 U.S.C. §1332 to tribal corporations because an entity organized under tribal law "is the equivalent of a corporation created under state and federal law for diversity purposes." *Cook v. Avi Casino Enters.*, 548 F.3d 718, 722 (9th Cir. 2008)*; citing American Vantage*, 292 F.3d at 1099 n.8. Here, GRTI is a citizen of Arizona for purposes of diversity. *Floyd v. Panther Energy Co*., No. 3:10-CV-0095-F, 2012 U.S. Dist. LEXIS 205097, at *22-23 (N.D. Tex. 2012); *see also Cook*, 548 F.3d at 725 (finding tribal corporation was a citizen of both the state where its principal place of business was located, and the state where the tribe's headquarters were located).

GRTI alleges it was formed under the Community and maintains its headquarters in Chandler, Arizona.[3] Villareal Decl., Ex. B.GRTI's principal place of business and other business locations exist within the bounds of Arizona. *Id*; *See Cook*, 548 F.3d at 725*; citing RJ Williams Co. v. Fort Belknap Hous. Auth*., 719 F.2d 979, 982; *Parker Drilling Co. v. Metlakatla Indian Cmty*., 451 F. Supp. 1127, 1138 (D. Alaska 1978) (finding a tribal corporations only major business activities are located in Alaska, it is an Alaskan corporation for diversity purposes).

[3] *American Vantage Cos v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002)(state of incorporation of an Indian tribe for diversity jurisdiction purposes is the state in whose borders the reservation is located).

GRTI is conflating the analysis of extending tribal immunity to a corporation with the analysis of the citizenship of corporation for diversity purposes. *See* Mot. pg. 9. The key question in a diversity jurisdiction analysis, is whether any defendant is a citizen of the same state as the plaintiff. *See Cook,* 548 F.3d at 722. Here, the question becomes whether any defendant is a citizen of the state of Texas. There is no dispute that GRTI is not a citizen of the state of Texas, therefore, complete diversity exists between the Parties.

II. GRTI Is Not Entitled To Claim Sovereign Immunity and is Subject to the Jurisdiction of This Court

A. GRTI Has Expressly Waived Any Sovereign Immunity It May Have

A determination of whether the Community's tribal immunity should extend to GRTI to begin with is not necessary as GRTI has expressly consented to submit itself to the jurisdiction of this Court, waiving any alleged tribal immunity. This Court has Jurisdiction and GRTI's Motion should be denied.

The Supreme Court has established tribal immunity can be waived by written agreement. *C & L Enter., Inc., v. Citizen Band Potawatomi Indian Tribe,* 532 U.S. 411 (2001); *see also Miller v. Wright,* 705 F.3d 919, 924 (9th Cir. 2013) (agreeing to an arbitration clause may establish a clear waiver of sovereign immunity by an Indian tribe). In *C & L,* the Supreme Court held that even a tribe that undisputedly had tribal immunity, is able to waive sovereign immunity through a contractual dispute resolution provision. *C & L,* 532 U.S. at 414. The Supreme Court found the tribe waived immunity despite the fact that the contract contained no explicit language regarding (i) litigation in a foreign jurisdiction or (ii) waiver of immunity. *Id*. The Court acknowledged that a waiver of tribal immunity must be "explicit," but rejected the idea that an agreement must use any magic words like "waiver" or "immunity." *Id*., at 420-421; *see also Sakagon Gaming Enter. Corp. v. Tushie-Montgomery Assoc., Inc*., 86 F.3d 656, 659-60 (7th Cir 1996) (finding the "term

'sovereign immunity' is a technical legal term, and anyone who knows what it means can also understand the arbitration clause").[4]

GRTI contractually consented to both Texas law and the jurisdiction of federal and state courts within Harris County on terms far more explicit than the waiver at issue in *C&L*. The contract provision "no doubt memorializes" GRTI's "commitment to adhere to the contract's dispute resolution regime." GRTI contractually agreed that "***each Party hereby submits itself to the exclusive jurisdiction*** …" (emphasis added). Pasrija Decl. at Ex. A, §10.d. GRTI explicitly agreed to Texas as the governing law and unequivocally agreed to "submit to federal lawsuits." *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006); Pasrija Decl. at Ex. A,§10.d.

The Supreme Court acknowledged that such dispute resolution provisions have real world objectives and are "not designed for a game lacking practical consequences." *Allen*, 464 F.3d at 1046. The provision in the Master Agreement includes some of the "magic language" missing in *C & L*, directly referencing court enforcement and language which "clearly contemplates suits against" GRTI and contemplates "whether a suit may be brought." *Breakthrough* at 1177. A real-world consequence of the jurisdictional agreement is a waiver of any immunity.

While not necessary as a more explicit waiver is found here, we reach the same conclusion if we follow the arbitration provision analysis outlined in *C & L*. As in *C & L*, the Master Agreement provides the rules of the American Arbitration Association control any arbitration. Pasrija Decl. at Ex. A, §10.d The AAA Rules provide: "Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." *See* AAA Commercial Arbitration Rules Rule 52; *see also C &*

[4] Since *C & L*, courts have consistently acknowledged that similar clauses would be sufficiently explicit to waive tribal immunity. *See Allen*, 464 F.3d at 1046; *see also Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001); *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1183 (10th Cir. 2010)*; *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 407 (Colo. Ct. App. 2004).

L Enter.,532 at 411. The parties here agreed that Texas law governs the Contracts and any disputes. Pasrija Decl. at Ex. A,§10.d. Following *C & L's* analysis of the AAA rules and use of the state arbitration act, the construction of the dispute resolution provision can only lead to the conclusion that GRTI has waived any immunity with the requisite clarity. *C & L Enter*.,532 at 411.

i. GRTI Is Bound By the Waiver Because Its General Manager Had Authority

The Master Agreement was executed by the CEO/GM at the time, James Meyers. Pasrija Decl. at Ex. A. Mr. Meyers had actual authority to bind GRTI to the Agreements. GRTI and the Board of Directors made Mr. Meyers' authority clear by selecting Mr. Meyers as its GM. The GM serves as "principal operating officer" and "principal spokesperson" of GRTI. Villareal Decl., Ex. C. The GM is duly authorized by the Board of Directors to sign and execute any documents of indebtedness and "sign and execute all contracts in the name of the Corporation" as well as "orders for the payment of money." *Id*. at 7. Further, under Section 10.j of the Master Agreement, GRTI warranted that "Each person executing this MSA warrants his/her authority to execute this MSA." Pasrija Decl. at Ex. A. GRTI further agreed that the "MSA shall be binding upon the Parties hereto, their successors and permitted assigns."[5]

ii. Tribal Laws Have No Bearing On the Casino's Waiver of Immunity

GRTI attempts to argue that a waiver of tribal sovereign immunity must be made in accordance with the tribe's laws. Mot, pg. 14. The cases cited by GRTI address the immunity of a tribe itself, rather than a corporation and are not controlling. *Id*. Further, the Community Code does not control, as the issue of waiver of immunity in this case is governed by federal law, not tribal law so the procedural formalities contained in the Community Code are irrelevant. *See Smith*,

[5] Even if Mr. Meyers and Ms. Burkhalter lacked actual authority to waive immunity, as CEO/GM they were key employees who had apparent authority to do so. Courts have held that the doctrine of apparent authority applies when determining waivers of tribal immunity. *Rush Creek*, 107 P.3d at 407.

115 Cal. Rptr. 2d at 462; *Waburton/Buttner v. Superior Ct*., 127 Cal. Rptr. 2d 706, 720 (Cal. Ct. Appl. 2002)(holding that tribal law is "not self-enforcing or definitive").

The Supreme Court has repeatedly looked towards immunity cases involving foreign sovereigns as "instructive" in deciding waivers of tribal immunity. *See Kiowa Tribe of Okla. V. Manufacturing Tech., Inc*., 523 U.S. 751, 759 (1998); *C & L*, 532 U.S. at 421 n.3; *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc*., 179 F.3d 1279, 1298 (11th Cir. 1999) (finding a failure to comply with the procedural requirements under the law of the foreign state, did not preclude the waiver of immunity). Recognizing that if U.S. Courts were required to interpret foreign laws to determine if a waiver was effective, the courts would be required to undertake "lengthy unpredictable and frequently inconclusive inquiries into conflicting interpretations of foreign law."

GRTI claims it did not waive immunity in accordance with the Community Code. Mot. pg. 14.Any alleged failure by GRTI to comply with the rules of the place where it was organized, should not be used to now argue an improper waiver to avoid separate contractual obligations. In *Smith*, tribal law authorized immunity waivers only through a resolution or an ordinance passed by the tribal council, nevertheless, the Court found that tribal law was irrelevant in deciding whether immunity was properly waived. *Id*.; *see also Waburton/Buttner*, 127 Cal. Rptr.2d at 711.

iii. GRTI Has Repeatedly Ratified the Contract and is Estopped from Arguing an Improper Waiver

Despite the express waiver included in the Master Agreement, GRTI argues that there has been no waiver of any immunity. Motion at pg. 15. GRTI should be precluded from claiming there was no waiver as GRTI continuously acted in "a manner that recognizes the validity of the contract" while it had full knowledge of the material terms of that contract ratifying the contract it now seeks to avoid. *Malin Int'l Ship Repair & Drydock, Inc. v. Oceanografia*, 817 F.3d 241, 250 (5th Cir. 2016). GRTI continuously expressed its adherence to the agreements by i) making

payments to CHR from GRTI accounts, ii) accessing and utilizing the various products and billing functions to service customers, ii) using CHR training materials to train employees iv) working to implement the software, v) signing subsequent change orders, and much more. Pasrija Decl. ¶¶ 10, 11,14. Ms. Burkhalter further ratified the Contract when she continued to operate under the Contracts, signed additional contract documents including extensions of the scope of work. *See* Pasrija Decl. at ¶¶10-11. CHR has reasonably relied to its detriment that the GM/CEO had the authority to enter into the Contracts. As a result, GRTI should be estopped form denying the validity of the waiver contained within.

B. Any Alleged Immunity Has Been Abrogated By Federal Law

GRTI and its subsidiaries are involved in telecommunications industry, including telephone services, network infrastructure, internet, structured cabling, surveillance, low power TV, and cellular services for residential and commercial customers. These are heavily regulated industries subject to various federal and state regulations by the FCC, the SEC, and the Arizona Corporation Commission. GRTI's immunity has been abrogated. For example, GRTI and the related entities are subject to certain statutes including the Communications Act of 1934.[6] Villareal Decl., Ex. E. The Communications Act's definition of "common carrier" includes any entity involved in "interstate or foreign" communication by wire or radio, or radio transmission of energy. 47 U.S.C. 153 §3(10). The Acts reference to "foreign" abrogates any alleged immunity. *See Krystal Energy Co. v. Navajo Nation*, 357 F. 3d 1055, 1057 (9th Cir. 2004)(finding Bankruptcy Code reference to foreign and domestic governments abrogated immunity).

[6] Distinguishing *In re IntraMTA Switched Access Charges Litigation*, 158 F. Supp 3d 571, 574, where the Court stated the group of tribal corporations were not subject to regulation with the ACC. There is evidence that GRTI and its related entities are subject to federal and ACC regulation.

III. Tribal Immunity Does Not Extend To GRTI

Since GRTI waived any immunity it allegedly possessed, this Court maintains jurisdiction and it is unnecessary to evaluate whether GRTI was entitled to tribal immunity to begin with. As a separate corporation, GRTI is not entitled to the extension of the Community's immunity. GRTI's status as a corporation and business entity renders GRTI's "arm of the tribe" rational and test inapplicable. *Somerlott v. Cherokee Nation Distribs.*, 686 F.3d 1144, 1151 (10th Cir. 2012). However, when considering the factors raised by GRTI, it is clear immunity should not extend to GRTI. Business entities that claim "arm of the tribe" immunity have no inherent immunity of their own.

A. GRTI Invokes Non-Binding Authority that Does Not Require Extension of Immunity

Tribal immunity has traditionally applied to tribes while GRTI, a for-profit entity, is not a tribe. *See e.g.* GRTI Mot. As an initial matter, most of the arguments and case law relied on by GRTI focuses on the immunity of *tribes*. *See* Mot., pg.9 *citing Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 788 (2014); *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla*., 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Cases determining that tribes are immune from suit, even for commercial activities, do not establish sovereign immunity for GRTI as a separate corporate entity. *See* Mot., pg.9 *citing Kiowa Tribe*, 523 U.S. at 758 (expressing reservations about extending sovereign immunity even to the commercial activities of even *tribes* themselves as "immunity can harm those…who do not know of tribal immunity'). GRTI's reliance on cases involving *tribal governmental agencies* is also inapplicable to a corporation. The underlying purpose of the doctrine "allows Indian *tribes* to conduct their economic affairs through subordinate governmental agencies" and is not furthered in applying it

to a separate corporation. *Johnson v. Harrah's Kan. Casino Corp.*, No. 04-4142-JAR, 2006 U.S. Dist. LEXIS 7299, at *16 (unpublished) (D. Kan. 2006)

Reliance on cases involving the limited extension of immunity to tribally owned *casinos* is no more instructive here. Mot., pg.10. Tribal casinos are *sui generis* in federal Indian law. Under federal statutory law, "gaming by Indian tribes is recognized as a 'means of promoting tribal economic development, self-sufficiency and strong tribal governments'" *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 295 (Minn. 1996)(quoting 25 U.S.C. §2702); *see also Trudgeon v. Fantasy Springs Casino*, 71 Cal. Ap. 4th 632, 637-40 (1999)(recognizing the importance of ***gaming*** in promoting the self determination of tribes). Under federal law only tribal entities can engage in Indian gaming so a casino owned by a tribe necessarily "must be a tribal entity in order to conduct gaming." *Gavle*, 555 N.W.2d at 296. The extension of immunity to the unique situation posed by tribal casinos does not mandate the extension of immunity to a telecommunications company.

B. A Judgment Against GRTI Does Not Endanger The Assets Of The Tribe

GRTI provides a conclusory statement that the financial relationship between the Community and GRTI is "direct and compelling." *See* Mot., pg.14. In analyzing the financial relationship "if a judgment against it will not reach the tribe's assets or if it lacks the 'power to bind or obligate the funds of the [tribe]…" the entity is not entitled to immunity. *Runyon v. Association of Village Council Presidents*, 84 P.3d 437, 440 (Alaska 2004)*; see also Miami Nation Enterprises*, 386 P.3d at 373(finding "the starting point for analyzing the financial relationship" is "whether a judgment against the entity would reach the tribe's assets."). Typically, one of the key characteristics of any corporation is limited liability for the shareholders, who are generally not personally liable for the debts of the corporation in which they own stock. *Id*. at 441. The same is true here, where the corporate structure of GRTI functions to insulate the tribe. *see also Wright v. Colville Tribal Enter. Corp.*, 111 P.3d 1244, 1250 (Wash. Ct. App. 2005) (entities owned by the

tribes had no immunity where the entity's charters had provisions that stated the entities could not "[o]therwise bind or obligate the Tribes" thereby insulating the tribe). The Community Code states that a waiver of alleged immunity by a corporation does not function as a waiver of the immunity of the Community itself "any recovery obtained against a Community corporation through suit or arbitration shall be limited solely to the assets of the Community corporation. Villareal Decl., Ex. C.§4.204; *see also Dixon*, 772 P.2d at 1111.

It is clear a judgment against GRTI will not reach the tribes assets as GRTI have the power to bind the tribe's assets or obligate tribal funds. *Wright,* 111 P.3d at 1250. As a result, the inquiry should end there as tribal entities that generate their own revenue and cannot bind or obligate tribal funds cannot lay claim to tribal sovereign immunity. *See Sue/Perior*, 25 N.E. 3d at 935; *Runyon,* 84 P.3d at 440-441; *Dixon*, 772 P.2d at 1111. GRTI has not sufficiently established that a judgment against the entity would significantly affect the tribal treasury. *Miami Nation Enterprises*, 386 P.3d at 373. GRTI alleges that its revenues inure to the direct benefit of the Community and funds the Community's annual operating and capital budgets. *See* Mot., pg.14. GRTI argues that the extension of immunity to a tribally owned commercial enterprise is necessary because a commercial enterprise is a "central means" of raising revenue to fund tribal governmental services. *See* Mot. pg. 11; *citing Bay Mills,* 572 U.S. at 807 (Sotomayor concurring); *Breakthrough Management Group,* 629 F.3d at 1183. In these cases, involving casinos, the record included clear evidence of the majority of the casinos' revenue funding the tribe.

GRTI provides no evidence of the financials of GRTI or proof that such revenue goes to Community government programs. *Miami Nation Enterprises*, 386 P.3d at 378. For example, GRTI has not provided the amount of each distribution or percentage of the entity's revenue that allegedly flows to the Community. *Id*. The corporate documents make no reference to a quarterly

distribution as alleged in GRTI's Motion and state only that the Board of Directors "may from time to time declare" and the "Corporation may pay, dividends" and "dividends may be paid in cash, property, or shares of the Corporation." Villareal Decl., Ex. A §VII; Ex. B, §IX. Where it is unknown what percentage of revenue flowed from the business to the tribe, factor weighs against a finding of immunity. *Id*. at 378. GRTI's failure to provide such evidence should not force this Court to accept GRTI's conclusory allegations as true. Further, GRTI has entered into various agreements providing security interests in GRTI's assets, which include limitations on shareholder distributions. Rodriguez Decl. at Ex. F. GRTI has presumably incurred substantial loans, which it is obligated to repay. *Id*. Since GRTI provides no support, it is not clear whether the Community, as a shareholder, receives any funds from GRTI.[7]

Even accepting GRTI's conclusory allegation, or where liability "could theoretically impact tribal finances," GRTI "must do more than simply assert that it generates some revenue for the tribe in order to tilt this factor in favor of immunity." *Miami Nation Enterprises*, 386 P.3d at 378; *see also Sue/Perior*, 25 N.E. 3d at 935. Whether a purported arm of the tribe provides revenue to the tribe "is beside the point." *Id*. The test is "not the indirect effects of any liability on the tribe's income, but rather whether the immediate obligations are assumed by the tribe." *Id.* The passing of revenue from a tribal business to a tribe is not a relevant factor in evaluating the financial relationship between the business and the tribe. *Id*.

Finally, courts have found that insurance coverage of the separate corporate entity protects the assets of the tribe and undermines the argument for immunity. Upon information and belief, GRTI may possess insurance coverage[8] Insurance coverage and provisions dictate the conclusion

[7] While analysis of the factors is not necessary in denying GRTI's Motion, a decision to grant the Motion requires further jurisdictional discovery. GRTI has exclusive possession over key financial and ownership documents.
[8] GRTI maintains exclusive control of information and does not provide enough information for the court to determine if CHR's claim would be covered by any policy.

that tribal assets will not be threatened by refusing to recognize immunity. *Dixon*, 772 P.2d at 1111*; see also Sue/Perior Concrete*, 25 N.E.3d at 935. Since a judgment against GRTI does not place the Community's assets at risk, GRTI is not an arm of the Community and is not entitled to claim tribal immunity.

C. GRTI is legally separate and distinct entity from the Tribe

GRTI is a for-profit commercial entity, separate and distinct from the Community, which participates in a competitive national market for telecommunications services. The dispute involves GRTI (and its subsidiaries') relationships with CHR, a non-tribal service provider. Further, as telecommunications entities, GRTI and its subsidiaries are required to comply with state and federal telecommunications laws in their interactions with non-tribal third parties. Extending immunity renders any other contract entered by GRTI and its subsidiaries illusory, as the contracts will not be enforceable in any jurisdiction. The federal interest in promoting commercial dealings warrant upholding an express dispute resolution provision and waiver freely entered into by GRTI. *Dixon*, 772 P.2d at 1110 (acknowledging that this extensions of immunity may actual hinder a tribe's economic growth).

Native Technology Solutions appears to be a domestic limited liability company. [9] Rodriguez Decl. at ¶C. Gila Local Exchange Carrier is registered to do business in Arizona. There is information to suggest that GRTI was actually an entity that was acquired or is owned by a domestic corporation. Rodriguez Decl. at ¶I. There is evidence GRTI merged with a Dobson Arizona, an Oklahoma corporation, and was owned by ATTI, an Oklahoma corporation. *See* Rodriguez Decl. at Ex. I.[10] Courts have held that the fact that a tribal entity is incorporated provided

[9] There is information to suggest Native Technology Solutions is an Oklahoma limited liability company, Native Technical Solutions, LLC. Rodriguez Decl. at Ex. C. The Oklahoma Limited Liability Act expressly provides LLC's may sue and be sued. Okla. Stat. tit. 18, § 2003*; see also Somerlott.*, 686 F.3d at 1151.
[10] If GRTI is owned by an Oklahoma Corporation, it is not entitled to immunity. Okla. Stat. tit. 18, § 425.

the court with evidence that the entity is separate and distinct from the tribe and therefore cannot share in its immunity. *Somerlott,* 686 F.3d at1149-50; *Miami Nation Enterprises,* 386 P.3d at 371. Dobson provided a capital contribution that flowed through to GRTI and was used by GRTI to redeem all shares held by the Community, leaving Dobson, through ATTI, the sole shareholder.[11] If GRTI has merged with a domestic corporation incorporated in a state, GRTI is not entitled to immunity. *Somerlott,* 686 F.3d at 1149-50 (sovereign immunity does not extend to sub-entities incorporated as distinct legal entities under state law). The circumstances under which the entity's formation occurred, including whether the tribe initiated or simply absorbed an operational commercial enterprise" is relevant when considering this factor. *Miami Nation Enterprises*, 386 P.3d at 371; *citing Breakthrough*, 629 F.3d at 1191.

In considering the corporate arrangement, the Court should not merely rely on the formal documents provided by GRTI as formal arrangements do not trump functional considerations. The practical operations of the entity in relation to the tribe should be examined in addition to the legal or organizational relationship given the manipulability of formal arrangements. *Miami Nation Enterprises*, 386 P.3d at 375; *Finn*, 689 Fed App'x at 611. Otherwise, the doctrine risks expansion "beyond its established rationales and indeed beyond common sense." *Id*.

GRTI has not provided sufficient information to establish the Community excerpts sufficient control over GRTI's activities as to render it an "arm of the tribe." This inquiry examines not just the "entity's formal governance structure," but also the "entity's day-to-day management." *Id*. at 373. GRTI alleges that as the single shareholder, and the Community Council is the controlling entity. Mot.,pg. 3. There is no evidence that the Community Council actually asserts such control. The day-to-day management and control of GRTI is handled by key officers,

[11] Jurisdictional discovery would provide clarity on the ownership and structure of the entities.

including the GM, Assistance GM, a Secretary, and a Treasurer. *Id*. at §IV. The officers possess the authority to "perform the duties in the management" of the company. *Id*. The officers are "duly authorized" to sign and execute "all deeds, mortgages, bonds, and other instruments of equity or indebtedness," "contracts in the name of the Corporation, " and "notes, drafts, or other orders for the payment of money." The key officers are the individuals that direct the operations of GRTI and control the corporation. *Miami Nation Enterprises,* 386 P.3d at 375.

The question is not whether the purported arm of the tribe is "owned by the tribe. Rather, the issue is whether the property used by" the purported arm of the tribe "is owned by the tribe." *See Sue/Perior*, 25 N.E. 3d at 934-35. GRTI and its subsidiaries owns real property, personal property, equipment, machinery, etc. in their own name and have provided others a security interest in its property. See Rodriguez Decl. at Exs. E, F. The ability of GRTI and its affiliates to own and maintain property in their own name weighs against the extension of tribal immunity.

D. GRTI's Stated Purpose Is Not Served By An Extension Of Tribal Immunity

Controlling law does not require the evaluation of the entities purpose. However, some jurisdictions look at the entities purpose, giving weight to whether the entity was organized for governmental or commercial purposes. *See, e.g. Gavle,* 555 N.W. 2d at 294. The stated purpose of GRTI at establishment was that of a for-profit business. *Dixon.,* 772 P.2d at 1110. GRTI is "authorized to do and have all powers common to domestic corporations" And engage in the "construction, operation, and maintenance relating to the retail or wholesale sales of telephones, computers, electronic equipment, and provisioning of telephone signals over wireline, microwave and cellular radio systems, the provision of cable television service and electronic data of all type and kinds including software…" Villareal Decl., Ex. C.

GRTI was expressly established with the authorization to "enter contracts, incur obligations" or "otherwise engage in, transact, or carry on business" both on and off the Reservation. *Id*. The Community Code acknowledges that Telecommunications Services involve transactions "with another provider of telecommunication services" as well as "interstate transmissions" which include "charges by a provider of telecommunication services" for transmissions that will transmit outside the reservation and the State of Arizona. Villareal Decl., Ex. A,§13.304.

GRTI states that its intended purpose is to provide necessary public services to Community members living within the boundaries of the Reservation. *See* Villareal Decl. at ¶8. Courts must consider both the stated purpose for which the entity was created and the "degree to which the entity actually serves that purpose." *Miami Nation Enterprises*, 386 P.3d at 372. This purpose was not added to the contract documents until an amendment in 1999. Villareal Decl., Ex. B, §II. The purpose when GRTI was established included language that GRTI was a "corporation for profit." *Id*. GRTI also argues that the 1999 amendment to the Articles of Incorporation shows a clear intent for GRTI to have immunity. Tribal intent as expressed in an entities' organizing documents "reveals little about whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe." *Miami Nation Enterprises*, 386 P.3d at 379; *quoting Allen*, 464 F.3d at 1046.

While "no single factor is universally dispositive," this factor should be given the least weight because its scope concerns exclusively formal considerations, which reveal little about the entity's actual activities. *Id*. at 374. Further, the intent to grant of immunity intended to avoid legal consequences and is not "the kind of transaction to which a Tribe's sovereign immunity was meant to extend." *Allergan, Inc. v. Teva Pharm. USA, Inc*., No. 2:15-cv-1455-WCB, 2017 U.S. Dist.

LEXIS 170825, at *12 (E.D. Tex. 2017) (tribal immunity is "not an inexhaustible asset that can be sold to any party that it might find it convenient" to obtain immunity from suit and "evade their legal responsibilities").

IV. Exhaustion of Tribal Remedies Is Not Required

CHR is not required to first exhaust its tribal remedies within Community Court. First, no such requirement exists. Second, the Community Court does not possess jurisdiction over CHR, a non-member entity. Finally, CHR has no remedies available within the tribal Community Court. The alleged immunity also seeks to protect GRTI from suit in tribal court. The tribal community court does not provide a venue to challenge jurisdiction and the remedies available are limited and restrained rendering recovery unattainable.

A. The Community Court Does Not Provide An Adequate Forum

An exception to tribal immunity occurs where the dispute (i) involves an issue outside of tribal affairs (ii) concerns an issue with a non-Indian, and (iii) the claim cannot be adjudicated in a tribal court. *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980). This case involves a basic contract dispute unrelated to tribal affairs and there is no tribal court where CHR, a non-Indian, can bring its claims. GRTI argues that when tribal court jurisdiction has been asserted, a federal court may give tribal court precedence and afford it a full and fair opportunity to determine the extent of its own jurisdiction over a particular claim or set of claims. Mot., pg.17 *citing Ninigret Dev. Corp*., 207 F. 3d at 31 (1st Cir. 2000). As an initial matter, no tribal court jurisdiction has been asserted. Since no court jurisdiction has been asserted, this Court has no obligation to provide any deference to the tribal court.

Further, the tribal Community Court does not possess the power to determine the extent of its own jurisdiction of a claim involving a claim of tribal immunity. *Id*. at §4.205.The immunity referenced in the Community Code treats immunity from suit in the tribal Community Court the

same as immunity from state or federal court. *Id*. §4.204. The Community Code requires an additional waiver of immunity by the Community Council for anyone to maintain an action in Community Court against the Community or a corporation claiming tribal immunity. *Id*. §4.205.

The unfair procedures outlined in the Community Code raise significant due process concerns and leave CHR with no alternative forum where the dispute can be settled. *Dry Creek Lodge*, 623 F.2d at 682. Where a suit filed in Community Court raises the issue of tribal immunity, the Community Court is required to immediately stay the proceeding and the Council gets to determine whether it wants to allow the Community Court to proceed. *Id*. at §§4.205-6. The determination is not immediate, further depriving CHR a remedy to resolve the dispute in an orderly manner. *Id*. If the Council decides to maintain the claim of immunity, the matter will be dismissed with prejudice and is not appealable in the Community Court's Court of Appeals. *Id*.

There is never an adequate opportunity for CHR to challenge the tribal court's jurisdiction if this Court finds exhaustion applicable. There is no basis for exhaustion "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *See Johnson*, 2006 U.S. Dist. LEXIS 7299, at *32 (unpublished) (D. Kan. 2006); *see also Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1501 (10th Cir. 1997), cert. denied, 522 U.S. 1090 (1998); *Navajo Nation v. Intermountain Steel Buildings, Inc*., 42 F. Supp. 2d 1222, 1226 (D.N.M. 1999).

GRTI's argument that "the examination should be conducted in the first instance in the Tribal Court itself" is disingenuous, as GRTI is fully aware the immunity it claims applies in the Community Court as well. GRTI claims the exhaustion requirement is necessary here to "ensure that the tribal court may protect its own jurisdiction, thereby promoting the tribe's authority." Mot., pg. 17. GRTI argues that "tribal courts are best qualified to interpret and apply tribal law." *Id*.; *citing Iowa Mut. Ins. Co*., 480 U.S. at 977. This is an improper argument as again, the tribal

Community Court does not have the ability to determine its own jurisdiction. GRTI is aware the decision instead will be made by the Community Council who, as GRTI has provided, consists of the same individuals as GRTI's current Board of Directors. Motion, pg.13.

In the unlikely event that the matter may proceed in Community Court the Council is allowed to institute a plethora of conditions to the lawsuit that include caps and limits to the amount of recovery, limit the types of damages, and impose time limits for the litigation. The procedures and restrictions of the tribal Community Court present a level of unfairness to raise substantial due process concerns and preclude the Community Court as a viable forum. Where, as here, "it is 'plain' that… further litigation in the tribal courts 'would serve no purpose other than delay,' the exhaustion requirement does not apply. *WPX Energy Williston, LLC v. Jones*, 72 F.4th 834, 838 (8th Cir. 2023); *citing Strate v. A-1 Contractors*, 520 U.S. 438, 459, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997); *see also Fort Yates Pub. Sch. Dist. No. 4 v. Murphy ex. Rel. C.M.B.* 786 F. 3d 662, 672 (8th Cir. 2015).

B. CHR Did Not Consent To The Jurisdiction Of The Tribal Courts

CHR did not consent to the jurisdiction of the tribal Community Court through its application of a business license from the Community. Mot., pg.18. In applying for the business license, CHR was only provided with a copy of Title 13. The application states only that the applicant acknowledges it is "responsible for reading Title 13, and consent to the liability for and payment of all taxes imposed" making no reference of Title 4. Villareal Decl., Exs. G-H. Title 13 governs the taxes applicable to tribal and non-tribal entities and includes no reference to the Community Courts or a consent to the jurisdiction of the Community Courts. *Id*. Further, CHR's business license expired on March 28, 2022, therefore any alleged consent has expired.

Second, the Master Agreement controls and does not reference tribal Community Courts. As previously discussed, the parties specifically contracted for Texas law to govern, and tribal law

is irrelevant to the analysis. *See discussion supra* §C.1.b. The business license was in no way part of the consideration involved in executing the Contracts. Mot., pg.18. GRTI provides no support for this allegation. *Id*. The Contracts are the entire agreement between the Parties, and "supersedes in all respects all proposals and negotiations, conversations, discussions and agreements between the Parties…" *See* Pasrija Decl. at Ex. A, §10.p.

Third, tribal courts do not have jurisdiction over the activities of nonmembers of the tribe and generally lack inherent authority to regulate nonmember conduct that takes place outside their reservations. *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 175 n.5 (5th Cir. 2014); *citing Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091-92 (8th Cir. 1988)("Neither *Montana* nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring outside their reservations"); *see also Phillip Morris*, 569 F.3d at 938. The consensual relationship exception is not applicable as it requires the nonmember conduct to implicate tribal governance and internal relations. *Dolgencorp*, 746 F.3d at 178. GRTI references the Master Agreement to establish the consensual commercial relationship between the parties, yet ignores the express waiver contained in that Agreement. Mot. at 19. Finally, as discussed above, the tribal Community Court does not present a valid option to use. *See discussion supra* § D. As no tribal exhaustion is required, or even available, this Court is permitted to analyze its own jurisdiction.

V. In the Alternative, the Court Should Grant Jurisdictional Discovery or CHR Leave to Amend Its Complaint

A. Jurisdictional Discovery

There is sufficient evidence to establish that the contractually agreed upon dispute resolution provision within the Master Agreement was a clear and unequivocal waiver of any alleged tribal immunity possessed by GRTI therefore this Court has a sufficient basis to deny

GRTI's Motion without determining whether GRTI maintained tribal immunity at all. There is also sufficient information for this Court to deny GRTI's Motion based upon a finding that no tribal immunity extends to GRTI. However, in the alternative, CHR requests jurisdictional discovery or an evidentiary hearing to determine jurisdiction before this motion is ruled upon. *See, e.g. Finn*, 689 Fed. App'x, at 610.[12] A more satisfactory showing of facts is necessary for the Court to reach a determination that it lacks jurisdiction. *Id*.; *see also Sizova v. Nat'l Inst. of Standards & Tech*., 282 F.3d 1320, 1326 (10th Cir. 2002). Particularly where GRTI is solely in possession of exclusive facts that are important to GRTI's claim of tribal immunity. CHR has no means to secure evidence to verify or disprove its belief about the Community's lack of tribal control or benefit without engaging in jurisdictional discovery. *Finn*, 689 F. App'x at 611; *citing Ignatiev v. United States* 238 F.3d 464, 467, 345 U.S. App. (D.C. Cir. 2001) (holding district court erred in denying limited jurisdictional discovery because although plaintiff suspected the existence of policies relevant to immunity, he had no way to know if such polices actually existed absent discovery).

B. Leave to Amend

Further, CHR seeks leave to amend its complaint. FRCP Rule 15(a) requires a trial court to grant leave to amend freely, and such rule "evidences a bias in favor of granting leave to amend." *Smith v. EMC Corp*., 393 F.3d 590, 595 (5th Cir. 2004). District courts "must possess a "substantial reason" to deny a request for leave to amend. *Id.* This Court should grant CHR leave to amend its Complaint to add jurisdiction under 28 U.S.C. §1331 as a federal question is presented here. The Supreme Court has held that the question of whether an Indian Tribe retains the power to compel a non-Indian party to submit to the civil jurisdiction of the tribal court is one that must be answered

[12] Should the Court order jurisdictional discovery, CHR is prepared to provide a supplemental submission outlining the additional discovery that is necessary. For example, a more satisfactory showing regarding the actual workings of GRTI and its financial relationship with the Community is necessary for a thorough consideration of the factors.

by reference to federal law and is a federal question under §1331. *See Auto-Insurance*, 495 F.3d at 1021; *citing National Farmers Union Insurance Co. v. Crow Tribe of Indians of Montana*, 471 U.S. 845, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985). As previously discussed, the tribal Community Court does not provide an adequate forum for recovery, therefore there are no concerns of comity that direct tribal remedies be exhausted. Subjecting CHR to the jurisdiction of the tribal Community Court will violate CHR's due process rights. Therefore, this Court should grant CHR leave to amend its complaint.

CONCLUSION AND PRAYER

For these reasons, Plaintiff CHR Solutions, Inc. respectfully requests that this Court deny Defendant Gila River Telecommunications, Inc.'s Motion to Dismiss, or in the alternative, grant CHR's request for jurisdictional discovery and leave to amend its complaint. .

Respectfully submitted,

BOYARMILLER

By: */s/ Lee A. Collins*

Lee A. Collins
State Bar No. 00790484
Federal Bar ID:19221
lcollins@boyarmiller.com
2925 Richmond Ave., 14th Floor
Houston, Texas 77098
Telephone: (713) 850-7766
Facsimile: (713) 552-1758

Attorneys in-charge for CHR Solutions, Inc.

OF COUNSEL:

Jade Rodriguez
State Bar No. 24128200
Federal Bar ID: 3772383
jrodriguez@boyarmiller.com
2925 Richmond Ave., 14th Floor
Houston, Texas 77098
Telephone: (713) 850-7766
Facsimile: (713) 552-1758